Supreme Court, U.S.
FILED
981627 APR 9 - 1999
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PAT CASTALDO,

Petitioner,

v.

NEW YORK CITY BOARD OF EDUCATION,
RICHARD UROVSKY and ARLENE SHAPIRO,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a white civil litigant seeking redress for employment discrimination under 42 U.S.C. § 1981 ("Section 1981") entitled to a new trial when the United States Court of Appeals for the Second Circuit upheld a decision denying such citizen standing and a right of action in conflict with prior decisions of this Court and the United States Court of Appeals for the same circuit.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. The Parties.	3
1. Petitioner Pat Castaldo.	3
2. Respondents.	3
B. Factual Background.	3
1. Castaldo's Early Satisfactory Employment History.	3
2. Castaldo's Employment Evaluations After He Began Representing Non-White Grievants.	4

Contents

Page

3. The Underlying Claims for Employment Discrimination. 6

4. The District Court's Judgment. 6

5. The Second Circuit's Decision and Denial of Re-Hearing. 8

Reason for Granting the Writ 9

I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's Prior Rulings Regarding A White Citizen's Right To Assert A Valid Cause Of Action Under Section 1981. 9

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

DeMatteis v. Eastman Kodak Company,
511 F.2d 306 (2d Cir. 1975) 11, 12

Heflin v. United States, 358 U.S. 415 (1959) 9

L.N. McDonald v. Santa Fe Trail Transportation Company,
427 U.S. 273 (1976) 2, 8, 9, 10, 11, 12

Pennsylvania R. Co. v. O'Rourke,
344 U.S. 334 (1953), *supc'd by stat.*, *Hurston v. Director*, 989 F.2d 1547
(9th Cir. 1993) 10

Price v. Federal Express Corporation,
660 F. Supp. 1388 (Dist. of Co. 1987) 12

Radiant Burners, Inc. v. People's Gas Light and Coke Company, 364 U.S. 656 (1961) 9

Skinner v. Total Petroleum, Inc.,
859 F.2d 1439 (10th Cir. 1988) 12

Sullivan v. Little Hunting Park, Inc.,
396 U.S. 229 (1969) 2, 8, 9, 10, 11

United States v. Seaboard Air Line Railroad Company,
361 U.S. 78 (1959) 9

Cited Authorities

	Page
Statutes:	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1981	*passim*
42 U.S.C. § 1981(a)	2, 10
42 U.S.C. § 1981(b)	2, 10
42 U.S.C. § 1982	10
42 U.S.C. § 1983	6
42 U.S.C. § 2000-e *et seq.*	6
United States Constitution:	
Fifth Amendment	1
Rule:	
Fed. R. Civ. Proc. 56	6

TABLE OF APPENDICES

Page

Appendix A — Summary Order Of The United States Court Of Appeals For The Second Circuit Dated And Filed October 29, 1998 ..... 1a

Appendix B — Transcript Of Proceedings Dated October 20, 1997 ..... 5a

Appendix C — Judgment Of The United States District Court For The Southern District Of New York Dated And Filed November 4, 1997 ..... 15a

Appendix D — Order Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed January 14, 1999 ..... 17a

Petitioner, Pat Castaldo ("Castaldo"), *pro se*, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The unpublished decision of the Court of Appeals for the Second Circuit ("Court of Appeals") is attached hereto in the Appendix at 1a.

The district court in *Castaldo v. New York City Board of Education, et al.*, No. 96 Civ. 8131, Hon. Lewis A. Kaplan, (the "District Court") orally entered an order dismissing Castaldo's claims for race discrimination under Section 1981. The relevant portions of the district court's ruling have been reproduced in the Appendix at 5a.

STATEMENT OF JURISDICTION

The opinion of the Circuit Court was entered on October 29, 1998. [1a]. Thereafter, the Circuit Court denied a timely petition for rehearing, such order having been entered January 14, 1999. [17a].

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall . . . be deprived of life liberty or property, without due process of law. . . ."

Title 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. . . .
>
> For the purposes of this Section, the term "make and enforce contracts" includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. §§ 1981(a) and (b).

STATEMENT OF THE CASE

The fundamental question in this case is whether a citizen is entitled to relief from a judgment if the District Court erroneously dismissed a valid claim for racial discrimination under Section 1981, solely because the citizen was white. In this case, the Court of Appeals has let stand a judgement by the District Court dismissing claims for racial discrimination in obvious conflict with this Court's opinions in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *L.N. McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976). To fully appreciate the significance of the issues presented, it is essential to consider the circumstances and important civil rights violated by such judgment.

A. *The Parties.*

1. Petitioner Pat Castaldo.

Castaldo is a white citizen of the United States and, during all relevant times, was employed as a tenured biology teacher at Evander Childs High School in the Bronx, New York. At the time of his constructive discharge from such high school, he had approximately twenty-nine (29) years of experience teaching at various New York City schools. During much of his tenure, Castaldo was a long-standing member of the United Federation of Teachers, a union, and its Executive Board. As will be discussed below, Castaldo claims that he was constructively discharged from his employment in July 1995 as a result of retaliation and harassment, which began only after Castaldo represented non-white minorities in union grievances.

2. Respondents.

Evander Childs High School is operated by the New York City Board of Education. Richard Urovsky ("Urovsky") was the principal of such high school beginning in 1989. Arlene Shapiro ("Shapiro"), was the Chairman of the Science Department beginning in 1993.

B. *Factual Background.*

1. Castaldo's Early Satisfactory Employment History.

During his twenty-nine year tenure as a teacher in the New York City schools, Castaldo had consistently been rated "satisfactory" in all performance evaluations, under four

science department chairmen.[1] In fact, in 1992, Castaldo had been evaluated as a "most satisfactory" teacher by the science department chairman, Frank Uzzo. At about the same time, Castaldo was acting as a "mentor" to other teachers.

2. Castaldo's Employment Evaluations After He Began Representing Non-White Grievants.

By way of background, as part of their union contract, teachers in the New York City school system are entitled to file "grievances" with the administration. Teacher grievances generally arise from the teachers as a result of negative observation reports, critical letters, or adverse actions by the administration toward such teachers. Grievances are heard and decided by hearing officers. An aggrieved teacher is entitled to appeal the determination of the hearing officer through a contractually provided for grievance procedure, which included three stages, known as steps.

In February 1993, as part of his union membership responsibilities, Castaldo began representing other teachers who had filed grievances under their union contract, with the administration. Toward the end of the 1993 school year, Castaldo represented a black female grievant, who had been marked "unsatisfactory" by Urovsky. Castaldo alleged in the District Court that this particular grievant (Lynn Smith) made concrete allegations of race discrimination to Urovsky, the hearing officer at all initial, or Step I, hearings. Three weeks after the Step I hearing, where Castaldo represented the non-white claimant, Urovsky placed an unfavorable letter in

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1. Teachers in the New York City School system are evaluated by the school principal on a yearly basis and then rated "satisfactory", "marginally satisfactory" or "unsatisfactory".

Castaldo's employment file. In the court below, Castaldo claimed that this and further actions taken by the principal Urovsky constituted harassment under Section 1981 because it interfered with his contractual right to represent non-white grievants in accord with their union contracts.

The harassment continued during the next school year. During the 1993/1994 school year, Castaldo represented Carl Fraser, a black teacher, at several union grievance hearings where Urovsky was the hearing examiner. It was undisputed before the District Court that Carl Fraser, and his representative, Castaldo, specifically raised race during such grievances. Castaldo also represented several other non-white union grievants.[2]

At about the same time that Castaldo was representing such non-white grievants under the union contract, Castaldo noticed that Urovsky began making unannounced visits to his classroom. In one particular surprise visit, Urovsky apparently found Castaldo's lesson "unsatisfactory", and again observed one of Castaldo's classes in April 1995. The department chairman, Shapiro, observed a lesson and also marked the lesson "unsatisfactory". Thereafter, at the administration's request, Castaldo was evaluated by the acting principal of the Bronx High School of Science, a friend of Shapiro's, who also criticized the lesson given by Castaldo.

As a result of Castaldo's belief that he would be further harassed, marked "unsatisfactory", and otherwise singled out for his actions on behalf of the non-white and disabled grievants, Castaldo left his employment with the New York City School District in July 1995.

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2. Castaldo also represented a claimant disabled by multiple sclerosis at several grievance hearings.

3. The Underlying Claims for Employment Discrimination.

In October 1996, Castaldo filed a complaint in the District Court seeking damages from the respondents under 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 2000-e *et seq.*, and several New York State statutes.

By his complaint, Castaldo alleged, *inter alia*, that as a result of his union work on behalf of non-white grievants, the respondents discriminated against him by harassing him at his work with unannounced evaluations and "unsatisfactory" ratings, thereby causing him to be constructively discharging him from his employment. The basis for Castaldo's claim under Section 1981 was that he was seeking to redress the rights of non-white grievants under their contract with the New York City Board of Education. As is discussed below, such rights to defend the rights of non-whites are protected by the Constitution, Section 1981, and *stare decisis.*

At the close of discovery, respondents moved for summary judgment dismissing all claims, pursuant to Fed. R. Civ. Proc. 56.

4. The District Court's Judgment.

At oral argument of the summary judgment motion on October 20, 1997, the Honorable Lewis A. Kaplan, United States District Court Judge for the Southern District Court of New York, stated, *inter alia*:

> I think that the retaliation claim and the constructive discharge element of it both are quite

> thin. There is virtually no admissible evidence whatsoever that Mr. Castaldo, to the knowledge of the defendants, engaged in protected activity, here specifically to have been the representation in Step I grievance proceedings of union members making complaints of racial and ethnic discrimination.
>
> The only exception to that is the **assertion . . . that he represented a Mr. Frazier [sic] at several Step I hearing during which Mr. Frazier [sic], whose grievances were on other subjects at that stage, complained that he was a victim of racism.** Nonetheless, I think that that is adequate to raise an issue of fact in the circumstances, and that's the basis for my denial of summary judgment on the retaliation claim.

[Emphasis supplied] [District Court Judgment, Appendix, 12a].

In spite of his specific factual finding that Castaldo assisted Mr. Fraser, a non-white, to complain under the terms of their union contract, Justice Kaplan dismissed Castaldo's claim under Section 1981. With respect to such claims under Section 1981, Justice Kaplan stated:

> Now, . . . it is quite clear that the complaint fails to state a claim upon which relief may be granted under 42 U.S.C. § 1981, because there is no basis alleged, let alone evidence, to support a claim that whatever happened to [Castaldo] happened because he was white.

[District Court Judgment, Appendix, 13a].

As will be discussed in this Petition, such ruling is constitutionally infirm because it implies that a white citizen cannot seek damages under Section 1981 for racial discrimination, retaliation and harassment, based upon the white citizen's work vindicating the constitutional and contractual rights of a non-whites.

Upon entry of the judgment dismissing his complaint, Castaldo took a timely appeal to the Second Circuit Court of Appeals.

5. The Second Circuit's Decision and Denial of Re-Hearing.

Although the Second Circuit's decision entered October 29, 1998 [Appendix, 1a] acknowledged that Castaldo had sought damages under Section 1981, it failed to address the District Court's decision dismissing such claims. In particular, it is Castado's contention here, that the District Court erroneously dismissed his complaint on the ground that a white citizen could not maintain a cause of action under Section 1981.

In light of this Court's prior rulings in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *L.N. McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976), such rulings by the District Court and the Circuit Court of Appeals are constitutionally infirm and in conflict with the clear precedent permitting a white citizen standing to assert a cause of action under Section 1981, if that claim is based upon the white citizen seeking to redress the constitutional or contractual rights of non-whites.

Upon entry of the decision of the Court of Appeals, Castaldo brought a timely petition for re-hearing, which was denied, without further opinion, by order filed January 14, 1999. This Petition ensued.

REASON FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS REGARDING A WHITE CITIZEN'S RIGHT TO ASSERT A VALID CAUSE OF ACTION UNDER SECTION 1981.

Castaldo's petition for a writ of certiorari should be granted because the opinions below conflict with this Court's important prior rulings setting forth the fundamental right of a white citizen to assert a claim for racial discrimination and retaliation under Section 1981, if that claim is based upon the white citizen's work to vindicate the constitutional and constitutional rights of a non-whites. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *L.N. McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976).[3]

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3. This Court has granted petitions for certiorari where the decision of the lower court contradicts rulings of this Court. *See, e.g., Radiant Burners, Inc. v. People's Gas Light and Coke Company*, 364 U.S. 656 (1961) (petition granted where Court of Appeals dismissed complaint in conflict with controlling decisions of this Court); *United States v. Seaboard Air Line Railroad Company*, 361 U.S. 78 (1959) (petition granted where district court's ruling contradicted this Court); *Heflin v. United States*, 358 U.S. 415 (1959) (rulings made prior to decision by this Court formed basis for

(Cont'd)

By its terms, Section 1981 protects the exercise of the right to "contract", the right to "enforce contracts" and the related rights to "give evidence" and to "have the full and equal benefit of all laws and proceedings". 42 U.S.C. § 1981(a). For the purposes of Section 1981, the term "make and enforce contracts" includes, "the making, performance, modification and termination of contracts, and the **enjoyment** of all benefits, privileges, terms and conditions of the contractual relationship". 42 U.S.C. § 1981(b). That Castaldo, a white citizen, has standing, in the constitutional sense, to bring action to vindicate the rights of minorities to enjoy the benefit and privilege of their contracts, even union contracts, is well-settled.

In *Sullivan*, *infra*, the plaintiff, a white citizen, sought damages under 42 U.S.C. §§ 1981 and 1982 from a community corporation after he was expelled from such corporation for attempting to assign his rights in such corporation to a "Negro". *Id.* at 234. This Court specifically held that a white plaintiff has standing to maintain an action for racial discrimination based upon his actions seeking to vindicate the contractual rights of a non-white. *Id.* at 237.

In *L.N. McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976), this Court addressed the question of whether whites could maintain a cause of action for racial discrimination in employment under Section 1981.

(Cont'd)
successful petition for certiorari); *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), *supc'd by stat.*, *Hurston v. Director*, 989 F.2d 1547 (9th Cir. 1993) (conflict with earlier decision of this Court provided basis for petition).

In *McDonald*, two white employees of a transportation company were discharged for misappropriating cargo from one of the company's shipments, while a third, black employee, was not discharged. The white employees brought an action against the company and their union alleging that the employer had discriminated against them on the basis of their race and that the union had permitted this discrimination by failing to represent one of them in grievance proceedings. *Id.* at 276.

The District Court dismissed the complaint on the pleadings. On review by certiorari, this Court, Mr. Justice Marshall, held that the protections of Section 1981 are available to white persons. *Id.* at 296. In so holding, Mr. Justice Marshall reviewed the entire statutory history of Section 1981 and noted that the statute was specifically "designed to protect 'the same right . . . to make and enforce contracts' of 'citizens of every race and color' ". *Id.* at 295. The facts and holding of *McDonald* apply directly to facts in the case at bar. Here, Castaldo, a white citizen, alleged that he was seeking to enforce the rights of non-white teachers to address racially motivated discrimination by their employer, a right which was guaranteed by their contract.

Indeed, the Second Circuit has itself recognized the right of a white citizen to seek redress from the courts of this nation should that white citizen be "punished for trying to vindicate the rights of (non-white) minorities". *DeMatteis v. Eastman Kodak Company*, 511 F.2d 306, 312 (2d Cir. 1975) *citing Sullivan*. In *DeMatteis*, an employee brought a civil rights action alleging illegal employment actions under several federal statutes, including Section 1981. *Id.* at 312. The plaintiff contended that his employer "forced" him into retirement solely because he sold his house to a black

employee of the same company. *Id.* In particular, the plaintiff contended that his early retirement was precipitated by his employer's vindictive conduct, which exacerbated his health problems and caused him to retire prematurely. *Id.*

The district court dismissed the Section 1981 claim on the ground that a white person did not have standing to sue under that section of the Civil Rights Act. *Id.* In reversing and remanding the case to the district court, the Second Circuit recognized that the plaintiff had a legally cognizable interest in being free from reprisal for vindicating the contractual rights of his fellow employee to contract. *Id.*[4] Such case is exceedingly apposite here.

Despite the holdings above, in the case at bar, the District Court, and, in turn, the Second Circuit, refused to recognize Castaldo's right to seek redress for his fellow employees' contractual rights under their union contract. Just as this Court has upheld the rights of the plaintiff to claim discrimination under Section 1981 in *McDonald*, *infra*, this Court should grant this petition and recognize Castaldo's right to seek redress under Section 1981, a right which the lower courts have trampled.

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4. Other courts have specifically recognized the rights of white citizens to file retaliation claims under Section 1981, where a white citizen objects to what is perceived as racially discriminatory conduct against non-white persons. *See, e. g., Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988) (white former employee's claims bifurcated from Title VII, and Court held, "although plaintiff was not fired because of his race, it was a racial situation in which he became involved that resulted in his discharge"); *Price v. Federal Express Corporation*, 660 F. Supp. 1388 (Dist. of Co. 1987) (white employee claimed harassment and constructive discharge because of employee's participation in prosecution of fellow employee's race discrimination claims).

Castaldo's petition should be granted so that the Court may affirm the importance of its longstanding holdings on a white citizen's right to seek redress for discriminatory actions by an employer when that citizen was exercising his constitutional and contractual rights to vindicate the rights of non-white citizens.

CONCLUSION

This case presents a question of exceptional importance — whether a white civil litigant is entitled to relief from a judgment if the District Court judge ignored clear precedent from this Court, which specifically provided such right. If the opinions below are permitted to stand, Castaldo will have been denied his due process right to a trial under Section 1981 and will forever suffer the consequences of a decision that deprived him of his longstanding right to bring such action as a white citizen. By granting the petition, this Court can correct the Second Circuit's decision, which similarly deprives Castaldo of his federally protected right as a white citizen to redress the wrongs, constitutional and contractual, of his fellow employees. In so doing, this Court can also reaffirm the important role played by such white citizens who stand up to their employers and demand equal protection under the laws for their non-white compatriots.

Accordingly, Castaldo respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED OCTOBER 29, 1998

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-nineth **day of** October **one thousand nine hundred and ninety-eight.**

PRESENT:

Hon. John M. Walker, Jr.,
Circuit Judge,
Hon. Michael B. Mukasey,*
District Judge,

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* The Honorable Michael B. Mukasey, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

Hon. Jane A. Restani,[**]
Judge.[***]

97-9294

PAT CASTALDO,

Plaintiff-Appellant,

-v.-

NEW YORK CITY BOARD OF EDUCATION, RICHARD UROVSKY and ARLENE SHAPIRO,

Defendants-Appellees.

* * *

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York (Kaplan, *J.*), and was argued by appellant and submitted by appellees.

[**] The Honorable Jane A. Restani, of the United States Court of International Trade, sitting by designation.

[***] Pursuant to 28 U.S.C. § 46(b) and an order of the Chief Judge of this Court certifying a judicial emergency, this case was heard by a panal consisting of one Circuit Judge of this Court and two judges of other courts sitting by designation.

Appendix A

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is AFFIRMED.

In October 1996, Castaldo filed in the district court a complaint pursuant to 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and §§ 296 and 297 of the New York State Executive Law alleging that the defendants discriminated against him on the basis of gender, age, and the fact that he was a union advocate for co-workers in their grievance proceedings. He alleged that defendants discriminated and retaliated against him by rating him "unsatisfactory" for the 1994-95 school year, and that he was constructively discharged.

The district court granted summary judgment pursuant to Fed. R. Civ. P. 56 on the gender and age discrimination claims, judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) on the constructive discharge claim, and allowed the retaliation claim to be decided by a jury. The jury found no retaliation because Castaldo had not been subject to an adverse employment action. Judgment was entered in favor of the defendants and the complaint was dismissed. Castaldo appeals, and seeks a new trial based on alleged trial errors and judicial bias.

Castaldo's age discrimination claim was properly dismissed because age discrimination is not cognizable under Title VII, 42 U.S.C. § 2000e-2(a). Because Castaldo was unable to establish a *prima facie* case of gender discrimination, that claim was also properly dismissed. *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64-65

(2d Cir. 1997). Further, Castaldo failed to demonstrate that he suffered an adverse employment action. *See Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714 (2d Cir. 1996). Finally, because Castaldo failed to demonstrate that a reasonable person in his circumstances would have felt compelled to quit, his constructive discharge claim was properly dismissed. *See Stetson v. NYNEX Serv. Co.*, 995 F.2d 355, 360 (2d Cir. 1993).

With regard to the alleged trial errors and judicial bias, there is no evidence of bias, and none of the alleged errors, viewed in the context of the entire proceeding, provide a basis on which this court may grant a new trial. *See Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 911 (2d Cir. 1997).

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk
By:

s/ Lucille Carr
Lucille Carr, Deputy Clerk

APPENDIX B — TRANSCRIPT OF PROCEEDINGS DATED OCTOBER 20, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 8131 (LAK)

PAT CASTALDO,

Plaintiff,

v.

NEW YORK CITY BOARD OF EDUCATION, RICHARD UROVSKY AND ARLENE SHAPIRO,

Defendants.

October 20, 1997
11:45 a.m.

Before:

HON. LEWIS A. KAPLAN,

District Judge

* * *

[2] THE COURT: Be seated, folks.

Look, let me, in the interest of focusing this and saving a little time, give you an indication of where I am on this. I have read your papers carefully over the weekend.

Appendix B

Mr. Kaplan, I don't see this case. I don't see it on any dimension. I see no evidence whatsoever of gender discrimination. I see no evidence whatsoever of age discrimination. And I see substantially no evidence of retaliation, the qualification being that there is some inadmissible evidence which, stretched perhaps past the breaking point, might give you something to hang your hat on, but I'm doubtful about that, and, in any case, it is inadmissible.

I mean, what appears to me here is that this guy, your client — I mean no disrespect, of course — but Mr. Castaldo had a personality conflict with Mr. Urovsky. He eventually decided to throw in the towel and take early retirement, and now he's trying to strike here for a little extra bonus. And he has come up with this retaliation claim by, in essence, attempting to invent the story that the reason for what happened is that he represented, in grievance proceedings, people who made race discrimination complaints. And there is, as far as I can see — and I hope you will enlighten me if I miss something — essentially no [3] competent evidence at all that he ever represented anybody in a race discrimination claim during the relevant period, let alone that that had anything to do with his termination.

Now, with that background, now maybe you will tell me what I've missed.

MR. KAPLAN: OK, your Honor. Mr. Castaldo represented six grievants when he started to handle grievance proceedings in 1993 when the previous chapter leader retired. Four of those grievants made definite claims of race discriminations at Step I —

Appendix B

THE COURT: All right. Who are they? What are their names? Let's get right to the record.

MR. KAPLAN: Their names are Lynn Smith.

THE COURT: Next.

MR. KAPLAN: Carl Frazier. Smith and Frazier claimed —

THE COURT: Who are the other two?

MR. KAPLAN: The other two are Carlson and Cruz. Cruz did not specifically articulate claims of race discrimination at the Step I grievance. He did make the claims to my client, Mr. Castaldo, and Mr. Castaldo advised him not to process the grievance on that basis, your Honor.

THE COURT: All right. Look, it would seem to me that if Cruz said — whispered in your client's ear, to speak figuratively, whatever it is happened to me, I think [4] the real reason is race, but they then proceeded and either never filed a grievance or proceeded with the grievance without any suggestion that there was an issue of race, that the Cruz grievance can't possibly be a basis for inferring that Urovsky was retaliating against your guy because he was advancing race discrimination claims.

* * *

Appendix B

[5] * * *

THE COURT: I read the deposition pages that you submitted and I remember nothing whatsoever to the effect that Mr. Urovsky was aware that your client was supporting Cruz in some race-related grievance.

So let's now go to Smith. What's the evidence that the defendant was aware that your client was engaged in protected activity with respect to a race claim on behalf of Smith?

MR. KAPLAN: My client appeared at a Step I grievance with Smith in which Smith made allegations of race discrimination.

THE COURT: Now, it is stipulated, first of all, that the documents contain nothing, correct?

MR. KAPLAN: Correct.

THE COURT: Where is the evidence that race was mentioned at the Step I grievance, where are these papers?

MR. KAPLAN: It is just on my client's say so, your Honor.

THE COURT: But where? I assume it has to be his affidavit, right?

MR. KAPLAN: Yes, your Honor.

THE COURT: So let's go to the videotape.

MR. KAPLAN: It does not say so specifically, [6] your Honor.

THE COURT: It does not even say so unspecifically.

MR. KAPLAN: No, it says that it was discussed with her beforehand.

MS. MARTINEZ: What paragraph are we on?

MR. KAPLAN: Paragraph 10.

THE COURT: So the long and the short of that is that there is no evidence that there was a race claim advanced by Smith or that the defense was aware of any support by your client for a race claim in relation to Smith, right?

MR. KAPLAN: Yes, Judge.

THE COURT: What is the next one? Frazier?

MR. KAPLAN: Frazier, yes.

THE COURT: Let's go to the evidence. Where is it? Paragraph 12 of your client's affidavit?

MR. KAPLAN: Yes, your Honor.

THE COURT: OK. So what you are saying is you are relying on this statement in the affidavit: "Mr. Frazier told me" — i.e., your client — "on several occasions that he believed he was being targeted on the basis of race. I believed that he was correct."

Right?

Appendix B

MR. KAPLAN: No, your Honor, I'm reading down to, [7] "Thereafter, I represented him at several Step I hearings, including one in June '94, at which he protested the U rating in which he specified that he was a victim of racism."

* * *

[21] * * *

THE COURT: All right. Then let me indicate what I intend to do here, and then if I've made some egregious error, you will tell me.

It is my intention to grant the motion for summary judgment dismissing the complaint in its entirety, with one exception, and that is the claim of retaliation under Title VII as against the New York City Board of Education, which would include the claim of constructive discharge.

The age discrimination claim has been withdrawn.

There is, as far as I can see, no significant basis for a claim of gender discrimination in this case. The only evidence relied upon by the plaintiff is a set of statistics which purportedly show that the incidence of unsatisfactory U ratings at Evander Childs High School during the period in question was higher for male teachers than for female teachers. Indeed, it is the plaintiff's submission that only male teachers received U ratings.

[22] I assume that on the claim of gender discrimination, the plaintiff, of course as he obviously is a member of a

protected class, I assume, but do not decide, that there is at least a genuine issue of fact as to whether he was qualified. But I think that the evidence, even recognizing that the burden on the plaintiff to establish a prima facie case is minimal, does not permit the conclusion that the prima facie case has been satisfied.

However you slice the numbers, the overwhelming majority of teachers of both genders were rated satisfactorily. The numerical difference is quite small. Moreover, it is important to recognize that the value of inferences drawn from statistics is directly related from the number of cases observed. In other words, if one looks at a thousand cases, the inferences are far more reliable by virtue of the laws of large numbers than if one looks at 100 cases.

To put it another way: If in a gender discrimination case we were dealing with 2,000 teachers, half male and half female, a 10-percent difference in the incidence by gender of unsatisfactory ratings would permit an inference of a gender basis for the difference to a far higher degree of confidence than if one were looking at a universe of 100 teachers, 50 men and 50 women. The reason for that, in part, without my attempting to be a [23] statistician here on the record, is that a change of only one or two ratings in a smaller group can produce dramatic changes in the percentages and yet be the product of chance. In this case, the numbers are small and so the percentages are, relatively speaking, not meaningful.

When that is coupled with the fact that there is nothing except the statistics to suggest gender discrimination, and with the fact that the alleged discriminator, Mr. Urovsky, is

of the same gender as the alleged victim, Mr. Castaldo, I conclude that no reasonable trier of fact on this evidence could infer that whatever it is that happened to Mr. Castaldo was a product of his gender.

I think that the retaliation claim and the constructive discharge element of it both are quite thin. There is virtually no admissible evidence whatsoever that Mr. Castaldo, to the knowledge of the defendants, engaged in protected activity, here said specifically to have been the representation in Step I grievance proceedings of union members making complaints of racial and ethnic discrimination.

The only exception to that is the assertion in paragraph 12 of Mr. Castaldo's affidavit that he represented a Mr. Frazier at several Step I hearings during which Mr. Frazier, whose grievances were on other subjects at that [24] stage, complained that he was a victim of racism. Nonetheless, I think that that is adequate to raise an issue of fact in the circumstances, and that's the basis for my denial of summary judgment on the retaliation claim.

So far as the constructive discharge element of it is concerned, I believe that the Board of Education makes a quite strong showing that the facts would not permit a reasonable trier to conclude that the plaintiff was left with no choice but to resign. Moreover, I think that the Board of Education has made a fairly persuasive argument that there was no adverse employment action as a result of whatever transpired here within the meaning of Title VII.

Nevertheless, I think that a more reliable determination would be the product of a trial where the texture and fabric of those issues could be explored. I do not by any means rule out the possibility of a Rule 50(a) decision on either or both of those issues, but I am not satisfied that the Board of Education has demonstrated, as it is its burden to do, that there is no genuine issue of material fact on those points at this stage.

Now, with respect to the other aspects of the complaint, it is quite clear that the complaint fails to state a claim upon which relief may be granted under 42 U.S.C. Section 1981, because there is no basis alleged, let alone evidence, to support a claim that whatever happened to [25] the plaintiff happened because he was white.

The claim under 42 U.S.C. 1983, insofar as it is brought against the Board of Education, is barred because it is entirely duplicative of Title VII.

The Title VII claim against the individual defendants is precluded by the Second Circuit's decision in the *Tomka* case, 66 F.3d.

Now, that leaves for consideration — and I want to give counsel an opportunity specifically to address it — the claim against Mr. Urovsky and Miss Shapiro under Section 1983. I am aware that the defense argues qualified immunity. I think it quite clear that there is no qualified immunity at this stage of the matter.

Appendix B

The record does not permit me to be more precise, to grant summary judgment on a 1983 claim as to the individuals on grounds of qualified immunity, because it does not exclude the probability that they quite deliberately retaliated against this person for engaging in protected activity at a time and in circumstances where they should have known what they did was illegal. But I'm not clear whether the 1983 claim against the individuals should be dismissed on the ground that it is essentially an end-run around *Tomka v. Seiler*. So, counsel, any thoughts?

* * *

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED NOVEMBER 4, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 **CIVIL** 8131 (LAK)

PAT CASTALDO,

Plaintiff,

-against-

NYC BOARD OF EDUCATION, RICHARD UROVSKY AND ARLENE SHAPIRO,

Defendants.

JUDGMENT

The issues in the above-entitled action having been brought on for trial before the Honorable Louis A Kaplan, United States District Judge, and a jury on October 29, 1997, and at the conclusion of the trial the jury having returned a verdict in favor of the defendants, it is,

ORDERED, ADJUDGED AND DECREED: That the Complaint be and it is hereby dismissed.

DATED: New York, New York
Nov. 4, 1997

Appendix C

SO ORDERED
s/ [illegible]
USDJ

JAMES M. PARKISON
Clerk of Court

BY: s/ [illegible]
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 14, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of January one thousand nine hundred and ninety nine.

Present:

Hon. John M. Walker, Jr.
Circuit Judge,
Hon. Michael B. Mukasey*
District Judge,

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* The Honorable Michael B. Mukasey, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix D

Hon. Jane A. Restani,**
Judge.***

Docket No. 97-9294

Castaldo

Appellant,

v.

New York City Board

Appellees.

A petition for rehearing having been filed herein by Pat Castaldo.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

** The Honorable Jane A. Restani, of the United States Court of International Trade, sitting by designation.

*** Pursuant to 28 U.S.C. 46 (b) and an order of the Chief Judge of this Court certifying a judicial emergency, this case was heard by a panel consisting of one Circuit Judge of this Court and two judges of other courts siting by designation.